Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

BOBBY GENE HUNTER,
Petitioner,

vs.

GLENN A. MUELLER, et al,

Respondent.

On Petition for Writ of Certiorari
To The Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the United States Court of Appeals for the Ninth Circuit err in denying Petitioner's request for a Certificate of Appealability based upon the finding that Petitioner has made no substantial showing of the denial of a constitutional right sufficient to be entitled to federal appellate review of the merits of his claims despite the substantial nature of the issues presented by Petitioner for appeal?

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OPINIONS BELOW

The judgment of the United States Court of Appeals for the Ninth Circuit, filed September 26, 2003, denied the Petitioner's request for a Certificate of Appealability. The Order appears in full in the Appendix A to this petition.

Petitioner sought a Certificate of Appealability in the Ninth Circuit after such a request was denied by the United States District Court for the Eastern District of California. The Civil Docket Report notes the Order denying the request for a Certificate of Appealability was filed May 23, 2003, and appears as Appendix B to this petition.

Petitioner sought a Certificate of Appealability to appeal the Order and Judgment of the United States District Court for the Eastern District adopting the Report and Recommendation of the Magistrate Judge and denying Petitioner's Writ of Habeas Corpus.

JURISDICTION

The United States Supreme Court has jurisdiction under Title 28 U.S.C. § 1254(1) to review denials of applications for Certificates of Appealability by a circuit judge or a panel of a court of appeals. Hohn v. United States, 118 S. Ct. 1969, 1978 (1998).

The Court of Appeals' Order denying the Petitioner's Request for a Certificate of Appealability was filed September 26, 2003. (see Appendix A).

Petitioner files the instant petition within ninety (90) days from the filing date of the Order of denial of the request for a certificate of appealability and this petition is therefore

within the jurisdictional time limit imposed under 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c).

CONSTITUTIONAL PROVISIONS INVOLVED

This case primarily involves statute 28 U.S.C. § 2253 controlling the issuance of a Certificate of Appealability, specifically section (c)(2) which states that "a certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right."

This petition for a writ of certiorari also implicates 28 U.S.C. § 2254, controlling an application for a writ of habeas corpus.

STATEMENT OF THE CASE

After fully exhausting his state court remedies, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of California on August 9, 1999, asserting that his conviction violated his constitutional rights on numerous grounds. The United States District Court for the Eastern District denied the petition on the merits by Order filed March 18, 2003. Petitioner filed a Request for Certificate of Appealability on April 4, 2003, as to each of the constitutional claims raised in the Petition. The Eastern District Court denied the request by Order on May 23, 2003.

This is a petition from the judgment of the United States Court of Appeals for the Ninth Circuit, entered September 26, 2003, in which the Court denied petitioner's Request for a Certificate of Appealability to challenge the

dismissal of his petition by the United States District Court for the Eastern District of California.

Upon denial and dismissal of his petition in the Eastern District, petitioner brought a Request for a Certificate of Appealability on grounds that he had made a substantial showing that dismissal of his federal petition and denial of his request for a certificate is in violation of a positional right. Petitioner claimed he was deprived of due process at various stages of his trial and the denial of federal review of the merits of his claims constitutes a deprivation of his constitutional right to due process.

As "an applicant may request that a circuit judge grant the certificate after a district judge has denied it," (See Nevius v. Sumner, 105 F.3d 453, 458 (9th Cir. 1996)), Petitioner then brought a request for a Certificate of Appealability in the Ninth Circuit Court of Appeals. The Ninth Circuit similarly denied the request and referenced 28 U.S.C. § 2253(c)(2) addressing the substantial showing requirement.

Petitioner herein brings this Petition for Writ of Certiorari on the issue of whether the United States Court of Appeals erred in denying Petitioner's Request for a Certificate of Appealability as Petitioner asserts his Petition for Writ of Habeas Corpus in the Eastern District Court satisfied the substantial showing required of the denial of a constitutional right sufficient to be entitled to federal appellate review of the merits of his claims.

STATEMENT OF THE FACTS

Petitioner submits that his Due Process rights were violated because his plea was not made knowingly, voluntarily or intelligently.

Petitioner submits that his Sixth Amendment right to counsel was violated because he was denied effective assistance of counsel.

Petitioner submits that his right to counsel was violated when he was never fully informed of the consequences of his plea.

Petitioner submits that right to effective assistance of appellate counsel was violated.

REASON FOR REVERSING THE DECISION OF THE LOWER COURT

THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT ERRED IN AFFIRMING THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DENYING PETITIONER'S CLAIM THAT HIS DUE PROCESS RIGHTS WERE VIOLATED.

The 6th Amendment to the Constitution of the United States ensures the right in all criminal prosecutions to public trial by an impartial jury; to be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense. These rights shall not be construed to deny other certain rights retained by the people. As stated in the 9th and 14th Amendments to the Constitution of the United States, these rights belong to the petitioner. A state may not make or enforce any law which abridges these privileges. An unknowing written waiver may not be construed to deny other certain rights such as the due process right to equal protection. For example, "had the court asked counsel whether he had advised the defendant of his right of confrontation and asked the defendant whether he waived that right, receiving an affirmative reply to *both* inquiries, this would satisfy the requirement of an express on the record waiver for that right." People v. Evanson (1968) 265 Cal.App.2d 698.

There is no advisement or waiver of these federal constitutional rights in the colloquy between petitioner and

the judge. Second degree murder is within a definition requiring malice aforethought. In court on October 14, 1993, The Court presumed that petitioner was advised of the charges. Counsel waived further reading of the complaint and advisement of constitutional rights.

The information filed October 21, 1993, states: On or about August 8, 1993, in the County of Butte, State of California, the crime of murder, a felony was committed by Bobby Gene Hunter, who did willfully, unlawfully, and with malice aforethought murder Josephine May Schain. Prior to accepting the plea this information was not read, petitioner never saw this. Counsel never reviewed this information with petitioner or gave him a copy of this information. At arraignment in municipal court petitioner was told he was charged with murder, the elements were not stated. The information was amended to second degree murder on Dec. 1, 1993, again the elements of the crime were not stated, and the only change is a penned in notation that this is second degree.

Petitioner plead not guilty to murder, would not have plead no contest to second degree murder had he known it stated he intended to kill the victim.

On July 14, 1997 at the evidentiary hearing the DA stated, "the defendants main disagreement with the process doesn't really apply here because he's saying he plead to second degree murder but he did not intend to kill the victim. Therefore he should be allowed to withdraw his plea...but second degree murder doesn't require the intent to kill, and voluntary manslaughter does, under that basis if you believe everything that he is saying, is consistent with going ahead and pleading to second degree murder. Because it doesn't require an intent to kill, on that basis counsel would not have

been ineffective.' And the defendant had the burden in this writ to show that he didn't know what he was doing because of his depression, combined with the use of Elavil, and that he basically had been forced to plead. Petitioner was not advised of his right to withdraw this plea. The Third District Court found there was no advisement given pursuant to Penal Code 1192.5. Petitioner didn't know that the court's acceptance of the plea was conditional. Bunnell error was committed but the court's opinion was that he waived his right to show it by not objecting, even though the court never addressed him at sentencing.

The distinction between murder and manslaughter is that murder requires malice while manslaughter does not. When the act causing the death, though unlawful, is done [in the heat of passion] or is excited by [a sudden quarrel such as amounts to adequate provocation] the offense is manslaughter. In such a case, even if an intent to kill exists, the law is that malice, which is an essential element of murder is absent. To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done [in the heat of passion or upon a sudden quarrel]. (CALJIC 8.50) This does not require intent to kill, it only states that even if an intent to kill exist, it is reduced because there is no malice. Even if implied malice could be shown, the fact that the act was done in the heat of passion upon a sudden quarrel would negate malice. Additionally, If you find that a defendant, while unconscious as a result of voluntary intoxication, killed another human being without intent to kill and without malice aforethought, the crime is involuntary manslaughter. When a person voluntarily induces [his] own intoxication to

the point of unconsciousness, [he] assumes the risk that while unconscious [he] will commit acts inherently dangerous to human life or safety. Under such circumstances, the law implies criminal negligence. (CALJIC 8.47) If you are satisfied beyond a reasonable doubt that the killing was unlawful, but you have a reasonable doubt whether the crime is murder or manslaughter, you must give the defendant the benefit of such doubt and find it to be manslaughter rather than murder. People v. Dewberry, (1959) 51 C.2d 548, 556-557, 334 P.2d 852, 857- 858. People v. Aikin, (1971) 19 C.A.3d 685, 699-705, 97 Cal.Rptr. 251, 261-265. (CALJIC 8.72) Petitioner would not have plead 'no contest' to second degree murder had he been advised that he was saying he willfully, with malice aforethought killed Josephine May Schain.

Additionally, Petitioner was not competent to enter the plea of no contest. The need for full understanding in entering a no contest plea is underscored by the rule with respect to withdrawing a plea, which allows a defendant to withdraw his plea for mistake, ignorance or inadvertence or any other factor overreaching defendants free and clear judgment. Johnson, supra, 35 Cal.App. 4th p.1357, citing People v. Superior Court, (Giron,(1974) 11 Cal. 3d.793, 797.)

We then consider whether the record in this case affirmatively shows that defendant's colloquy constituted a knowing and voluntary waiver of Constitutional rights. The evidence of petitioner's mental and emotional instability prior to the taking of the plea, and the quick litany of yes's and no's while under the influence of elavil did not meet the standards for establishing a voluntary, knowing, and intelligent waiver of Constitutional rights. United States v. Cochran, (9th Cir.1985) 770 F.2d 850, 851, 853. "Both colloquies were

very brief, and in both, the defendant's contribution consisted only of two or three 'yes' answers."

The Judge could not discern petitioner's understanding of his constitutional rights from the colloquy above since they are never mentioned. In U.S. v. Christensen 18 F.3d 822 (9th Cir. 1994), the colloquy complained of was more extensive than that of petitioner's. Christensen was told that he had the right to have twelve jurors, all of whom must find him guilty. Christensen replied that he understood that, and waived jury trial. In Petitioner's colloquy there were no clear concise questions as demonstrated in Christensen. All the questions asked by the Trial court, required only a Yes or No answer. The only actual sentence was an incorrect answer. Petitioner only completed the eighth grade, not the tenth. The medical records show that petitioner was under the influence of elavil, an anti-psychotic drug.

A Waiver by counsel is not sufficient; a fortiori, having been advised by counsel is not sufficient. (In Re Tahl, (1969) 1 C.3d 122 at p.131, 132; 81 Cal.Rptr. 577, citing People v. Holms, (1960) supra, 54 Cal. 2d. 442; cf.)

A 1203.03 diagnostic evaluation was noted in the plea agreement listed under "other possible consequences of this plea." Petitioner believed this evaluation was to happen before he was sentenced and sent to prison.

Boykin necessitates a more precise showing on all phases of a guilty plea than mere inferences however plausibly drawn from the circumstances on the record. California law would seem to require some express courtroom statement by the accused and to preclude waiver by even the most redoubtable inference from the record.

Thus we reach the second possible interpretation of Boykin: that each of the three rights mentioned self-incrimination, confrontation, and jury trial must be specifically and expressly enumerated for the benefit of and waived by the accused prior to acceptance of his guilty plea. This means that the record must contain on its face direct evidence that the accused was aware, or made aware. There is no evidence on the record to show that petitioner was aware of the substantive rights enumerated in Boykin.

Due process requires a court to conduct a competency hearing on its own motion, before permitting a defendant to waive constitutional rights when a reasonable doubt is present. United States v. Lewis, 991 F.2d 524, 527 (9th Cir.1993).

At the evidentiary hearing held July 3, 1997 the trial judge placed the burden of proof on petitioner to show that he was not competent to enter a plea. This post-conviction hearing was constitutionally inadequate to cure the state's initial failure to hold a competency hearing. It is clear that a violation of this right can only be cured by a post-conviction hearing in which the state bears the burden of proving that the defendant was competent to stand trial. In other words, the state must bear the burden of retrospectively proving competence if the trial court failed to provide the defendant with the constitutionally required competency hearing.

In the hearing transcripts on page 22, the Doctor stated that a 1368 evaluation was requested. Counsel states he never spoke to the Doctor. On pg. 26, the Doctor says he didn't do a formal 1368 evaluation, that it was never requested. On pages 67, 69 and 70, he states he wasn't aware that petitioner was suicidal, he would have done an evaluation had he known. He also stated that he did no evaluation after prescribing the elavil, that he spent five

minutes after initially seeing petitioner. He said he had no memory of him and did no evaluation before or after the medication was prescribed. Dr. Fithian is an experienced, medical doctor and should have known that the medication must be decreased to the lowest effective dosage.

Petitioner's counsel offered no reason why he failed to confer with the jail doctor. He stated he knew of the medication "early on", then he states he may not of known about the medication until he read the probation report.

Whether or not an evaluation was requested it is clear that there was reason to have requested the formal evaluation or independent examination.

[1] Trial court was required to hold a sua sponte hearing under Pate violation in failure to hold a contemporaneous hearing to determine competence, post conviction hearing was inadequate. It is therefore essential, that there be evidence the plea was voluntary and knowing.

Pate v. Robinson 383 U.S. 375, 86 S.Ct. 836. Suggestive evidence includes defendant's demeanor before the Trial court, previous behavior and available medical evaluations. Drope v. Missouri 420 U.S. 162,180 [95 S.Ct. 896,908] 43 L.Ed.2d 103 (1975); Lewis 991 F. 2d 527. In Pate the Supreme Court found that after six years there was insufficient evidence to make the required competency determination. The Court reversed the conviction and remanded for a new trial; thus the Court established that the burden of proving a defendant's competence in a retrospective determination is on the state. This precedent has been consistently followed by the Supreme Court, see e.g., Drope v.

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[1] Medical authorities do indicate that anti-psychotic drugs affect different subjects in different ways and may result in the subject becoming mentally confused.

Missouri, 420 U.S. 162, 183. 95 S.Ct. 896, 909, 43 L.Ed.2d 103 (1975) (reversing for new trial after finding that remand for psychiatric evaluation to determine whether defendant was competent to stand trial six years ago was not a proper remedy), and has frequently been applied by this circuit.

In every case where our court or the Supreme Court has addressed the sufficiency of the evidence for making a retrospective determination, we have affirmed the view that the state bears the burden of proving competence. Mr. Reilley stated on July 14, 1997 at the closing of the evidence, that the defendant had the burden in this writ to show that he didn't know what he was doing because of his depression, combined with the use of Elavil, and that he had basically been forced to plead.

"Once the petitioner has established [that the trial court should sua sponte have held a competency hearing].... he or she has made out a federal constitutional violation. At this point, the state has the opportunity to establish before the federal district court the petitioner's competency at the time of trial." Drope, Supra.

In Petitioner's case it would have been meaningful at the time prior to entering the plea to conduct a hearing to determine the actual effect of the drug that petitioner had been taking, on his ability to meaningfully participate in trial decisions. In contrast at the evidentiary hearing the only evidence of the actual effect of the drugs was Petitioner's testimony. Dr. Fithian, failed to monitor the effects of the drug and never did an evaluation to determine petitioner's competence while under the influence of elavil. Elavil, at this dose only produced a feeling of being drugged, did not

produce clarity of mind. [2]The usual maintenance dosage of amitriptyline is 50mg to 100mg per day. Over 150mg requires hospitalization. In order for a no contest plea to be constitutionally valid, it must be shown that the defendant entered his plea knowingly, intelligently, and must be made voluntarily.

(Boykin v. Alabama, (1969) 395 U.S. 238.) The test to determine the validity of a no contest plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.
There must be both the capacity to make an understanding choice and the absence of subverting factors so that the choice is clearly free and responsible. Von Moltke v. Gillies, (1948) 332 U.S. 708, 729,92 L. Ed.309 (Frankfurter, J., concurring.)

In order to make this voluntary and intelligent choice the defendant must be free from the influences of drugs that cloud his ability to make a rational choice. Where there is evidence that a criminal defendant is under the influence of some drug or medication that could preclude him from understanding the nature of the proceedings against him, the trial court must make a diligent and detailed examination of the voluntariness of the defendant's plea. There was evidence in the probation report that petitioner was under the influence of drugs and unstable.

Therefore, Petitioner asserts that the Ninth Circuit erred in denying Petitioner's claim that he was never fully aware of the consequences of his plea of no contest due to the high dosage of medication Petitioner was on. As such,

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[2] References: Amitriptyline by Mosby Inc. (copyright 1998). Guide to prescription drugs, Dr. Thomas Long, (1998); Physicians reference (1999)

Petitioner's plea must be withdrawn as it was taken in violation of his constitutional rights.

THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT ERRED IN AFFIRMING THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DENYING PETITIONER'S CLAIM THAT PETITIONER RECEIVED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

(1). Trial counsel failed to communicate with Petitioner throughout his court proceedings.

(a). Counsel did not investigate his client's mental state, did not argue for a diagnostic evaluation after indicating one would be done.

Counsel indicated in the felony plea form that a diagnostic evaluation may be requested pursuant to California Penal Code Section 1203.03. Counsel never even requested much less argued that this should be done. People v. Myers, (1984) 157Cal.App.3d. 1162; People v. Harris; (1977) 73 Cal.App.3d 76; People v. Nelson, (1967) 257 CalApp.2d 282; People v. Peace, (1980) 107 Cal.App.3d 996.

Petitioner was placed on suicide precautions twice, single celled and stripped of his clothes. Mary Lou Snodgrass had 18 counseling sessions with petitioner for periods ranging from 1½ to 2½ hours. She testified that petitioner had major depression. She conferred with Dr. Podel, head of

Step II Psychological Services, EED, a board certified Psychologist. Ms. Snodgrass observed that petitioner suffered major depression September 1993, through January of 1994, when she last saw him.

Ms. Snodgrass testified about petitioner's mental state at the evidentiary hearing. He wasn't eating or sleeping, showed signs of agitation, irritability, was hopeless and exhibited helplessness in not wanting to help himself. "I know I mentioned earlier about his fingernails. I am not sure I went into the details. I have never seen fingers like that. They were down to blood. He picked them down to where there was no fingernail left.

There was no nail left, and skin had come up over where the nails had been. His fingers hadn't healed when I had seen him the last time in January." Finding additional facts in the testimony of Ms. Snodgrass, stating the petitioner was unable to maintain his integrity as far as wanting to live, had difficulty concentrating and wasn't communicating, wanted to be punished, was punishing himself. She testified that "Bobby Hunter was clinically depressed, he was suicidal, he had thoughts that were in the extremes, his mood fluctuated from hopelessness to, I am just going to die, I shouldn't live; believing that he was an animal, that he should just—just didn't have a right to be here, and then fluctuating back to what was he going to do and how could he live with this and how could he move on."

Any time evidence appears which raises a sufficient doubt about the acussed's mental competency the court must order a competency hearing. Speedy v. Wyrick, 702 F. 2d 723, 727 (8th Cir. 1983). Counsel stated he appeared with petitioner in court on 8-19-93, but when the transcripts were obtained he had another attorney appear for him, never even

requested bail. Counsel repeatedly stated when asked direct questions "it is my practice." Petitioner asserts that the outcome of his case would have been different had trial counsel acted diligently and requested a competency hearing. Petitioner was under the influence of high doses of medication and this medication put Petitioner in a state of mind which did not allow him to make rational choices. Petitioner asserts that, had trial counsel conducted a competency investigation, the outcome of his case would have been different.

(b). The consequences of petitioner's plea were not mentioned until the end of sentencing.

The plea agreement stated Petitioner would be on parole 36 months. The mention of lifetime parole was very brief, at the end of Sentencing. Brown v. Doe, 3 F.3d 1236 (2nd Cir. 1993). The plea bargaining stage is critical, during which advice of counsel is essential.

"Plea bargaining, in other words, though a matter of criminal jurisprudence, is subject to contract-law standard. Therefore, the terms of the agreement, if disputed, are to be determined by objective standards." United States v. Arnett, 628F.2d 1162,1164 (9th Cir.1979); see also United States v. Fernandez, 960 F.2d 771,772 (9thCir.1992). (Hill v. Lockhart (1985) 474 U.S. 52, 55-56.) This is an issue of the length of parole and terms stated in the felony plea form which conflict with the actual sentence imposed.

The Boykin-Tahl-Bunnell requirement of advisement as to sentencing range and other direct consequences of the plea show sufficient prejudice to warrant reversal. The Third District Court of Appeal stated that Bunnell error had

occurred. (People v. Hunter, 3 Crim. C017582 (Ex. B2). The Court states, "The 36-month parole period was included in the plea form as part of the preprinted terms. It was obviously inappropriate for this case. The court did not mention the parole period in reciting the terms of the plea. Since lifetime parole is mandatory for second degree murder, the length of parole is not a proper subject for negotiation."

Evidence that petitioner was advised of the length of parole was not established outside the plea form, which the judge, the district attorney and the defendant's counsel signed. It was not stated on the record, a signed agreement was the only source. Where petitioner's constitutional rights were not waived on the record and were contained in the plea form, there is a question of ambiguity. In viewing the totality of the record, the court seems to imply that on one hand, he was advised by the written plea form and on the other, that the plea form was "obviously inappropriate." The record after sentencing simply states that, parole will be life. Length of parole is a consequence of this plea and lifetime as opposed to 36-months is not harmless error where there is no instruction.

The question of an effective waiver of a federal constitutional right is governed by federal standards. Boykin v. Alabama, supra, 395 U.S. at 243...A guilty plea, which works as a waiver of numerous constitutional rights, cannot be truly voluntary if the defendant 'has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt. Henderson v. Morgan, 426 U.S. 637, 645 n. 13...(1976) Accord, Smith v. O'Grady, 312 U.S. 329, 334 (1941). Petitioner had no understanding of the guilt he was asked to admit. In entering a guilty plea one must recite what was done but since this was a no contest plea his understanding of second-degree murder was never canvassed.

(c). If a criminal defendant is prejudiced by his attorney's errors, he must be given the opportunity to withdraw his plea. (Id. at p. 1355.) People v. Johnson (1995) 35 Cal.App. 4th 1351.)

In Johnson's declaration accompanying his writ of habeas corpus, he stated that had he been correctly advised of his maximum potential sentence of 27 years, he would never have accepted the plea bargained 20 year sentence. In permitting Mr. Johnson to withdraw his no contest plea, the Johnson court stated that: Where a defendant has been denied the effective assistance of counsel in entering a plea of guilty, he is entitled to reversal and opportunity to withdraw his plea if he so desires. Johnson, supra, citing People v. McCray (1985) 166 Cal. App.; 3d 1, 7.) To be valid, guilty pleas must be based upon the defendant's full awareness of the relevant circumstances and the likely consequences of his action. Johnson, supra, citing People v. Hunt (1985) 174 Cal.App. 3d 95, 104.)

Petitioner's situation is closely analogous to Mr. Johnson's. Petitioner would have accepted the offer of voluntary manslaughter and received a sentence of three, six, or eleven years. There is a significant difference in fifteen years to life and even the high term of eleven years. Petitioner would not have agreed to a stipulation for the factual basis or entered a plea of no contest, had he known the plea meant that he intended with malice aforethought to kill the victim.

Like Mr. Johnson, petitioner entered his plea as a result of misunderstanding the fundamental facts surrounding his case. More important is the fact that petitioner would have gone to trial, he did not state he was guilty. A no contest plea, admits no guilt, to be found guilty of murder one must admit

guilt. There must be an understanding of the charges and of the consequences.

Normally the record contains an explanation of the charge by the trial judge or at least a representation that the nature of the offense has been explained to the accused. Henderson v. Morgan, (1976) 426 U.S. 637 Id. at 647. Counsel had stated that on December 1, 1993 before the signing of the felony plea form he did not advise petitioner of malice aforethought or intent to kill as an element of second degree murder.

Counsel sought advice from another [3]attorney and a letter was received September 13, 1993. This advises, "heat of passion may be shown by the facts and circumstances leading up to the killing". Even though counsel sought advice, he never acted on the advice he received which clearly stated; Evidence of voluntary intoxication may be shown to negate malice and any other element of murder. The defendant's counsel may present expert testimony on voluntary intoxication. Counsel never sought any expert opinion or investigated this defense. He was advised that if the victim provoked the defendant, alternating between acceptance and rejection, being sexually intimate with him, these incitements could tend to show he acted because of a sudden and uncontrollable rage. He then states that the conduct of the victim had to be such as to cause him to act rashly from this passion.

(People v. Berry (1976) 18 Cal.3d 509, 515 [134 Cal.Rptr. 415, 418].) "The key element is not the duration or the source of provocation but whether or not defendant's

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[3] Jack D. Wood Attorney at law, Paradise, Ca. Ex. S3

reason was, at the time of his act, so disturbed or obscured by some passion, to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and act from this passion rather than judgment." Petitioner "immediately opened the door for the police, gave no resistance, was very polite to the officers." This is not the behavior of someone that knows he is guilty, or knows he did wrong.

(People v. Wharton (1991) 53 Cal.3d 522, 570, [280 Cal.Rptr. 631,660].) There is no specific emotion that alone would constitute the heat of passion. Witness Rowe stated that they had been intimate for the past month and that he had been with her that evening. He also knew that petitioner lived with the victim and they had an ongoing relationship. He stated that when they had an argument two weeks prior the victim had called him and stayed the night at his house without petitioner's knowledge.

(d). Counsel dismissed all possible defenses after stating he was developing grounds to show this was involuntary manslaughter.

In re Saunders, 2 Cal.3d 1042,1049; People v. Ibarra, 60 Cal. 2d 460; In re Williams, 1 Cal.3d at p.177). People v. Wax, 387 U.S.930; 18 L.Ed 2d 991, 40 AMJur 2d section 58 p.352, In the determination of whether the act which caused death was impelled by heat of passion or by malice, all the surrounding circumstances are to be taken into consideration. The instrument or weapon whether deadly or otherwise along with the slayers mental state. This is not to be determined solely from what takes place at the time of the killing, the previous relationship is to be considered.

Petitioner told counsel through the course of this proceeding that he never intended to kill or harm the victim, and he used no weapon.

In People v. Bridgehouse, 47 C2d 406 (1956) evidence that defendant was a man of excellent character; that he was mentally and emotionally exhausted was used to show only voluntary manslaughter. As in Bridgehouse, petitioner had a good reputation and was known as a hard worker. There were ten statements out of ten people that knew him declaring they had never seen him mad, never knew him to be violent. That he never drank to the point of being drunk.

Mullancy v. Wilbur, (1975) 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508, due process requires that in a homicide case the prosecution must prove beyond a reasonable doubt the absence of heat of passion. An intentional killing is manslaughter when it is committed under the influence of passion caused by provocation People v. Valentine, 28 Cal 2d 121, People v. Danielly, 33 Cal 2d 362, People v. Kelly, 208 Cal. 387,393.

Penal Code 187; if the defendant commits an act which endangers human life without realizing the risk involved, he is guilty of manslaughter. People v. Holt, 25 Cal 2d 59, People v. Cleaves, (App. 4th Dist.1991) 280 Cal.Rptr.146, 229 Cal.App.3d 367. Teague v. Lane, (1989.) 489 US.288, 103 L.Ed.2d. 334, 109 S.Ct 1060. People v. Wells, 149 Cal App 3d 497, Defines error which compels reversal of conviction. "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." United States v. Gaudin, 115 S.Ct.

2310, 2320 (1995), In Re Winship, 397 U.S. 358, 364 (1970). Edge v. Wainwright 347 F.2d 190, (16 ALR 3d.1030.)

Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989): Petitioner's counsel showed prejudice in not investigating information already in police reports. Integral to this analysis of prejudice is that counsel withdrew the defense that could negate intent: voluntary intoxication and heat of passion. See e.g., People v. Cameron, Supra.

Penal Code section 187, subdivision (a) defines second degree murder, in pertinent part, as the unlawful killing of a human being ...with malice aforethought. The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation or reflection, and from such passion rather than judgment.

All degrees of murder in the State of California are specific intent crimes, regardless of whether willful, deliberate, and premeditated Penal Code section 189. Moreover, as a specific intent crime, a charge of implied malice murder may be reduced to manslaughter when evidence of voluntary intoxication shows that the defendant did not actually harbor Malice aforethought. People v. Whitfield, (1994) 7 Cal.4th 437, 447, 27 Cal. Rptr.2d 858).

The DA made the formal offer on October 28, counsel failed to communicate this to his client and quit trying to defend his client prior to the trial ready conference. In re Johnson, (1965) 62 C. 2d 325,330;42 Cal. Rptr. 228, There is a presumption, of course, that in preparing this docket entry official duty was regularly performed (Code Civ. Proc., 1963, subd. 15), and on collateral attack such an entry must

ordinarily be deemed to speak the truth. [4] Even if true, however, the entry in the docket does not state how, when or in what manner . . . the defendant was informed of his constitutional rights (In re Newbern, (1959) 168 Cal.App. 2d 472, 476 [4a] [335 P 948]), nor does it specify which of his various rights were thus made known to him. Here, as in Newbern, the constitutional rights of the petitioner being involved we may look to the entire record to ascertain the meaning of the entry.

Petitioner retained Attorney Jodea Foster to begin a writ of habeas corpus July 3, 1995. Mr. Foster visited petitioner on January 19, 1996 at SCC State Prison at Jamestown, to discuss the facts surrounding his conviction for second degree murder. Petitioner told him that he had always maintained to Mr. Battle that he never intended to harm anyone, that Mr. Battle had never explained the degrees of murder or the elements of intent.

Here Counsels omissions were prejudicial and adversely affected petitioner's ability to knowingly, intelligently and voluntarily enter a plea of no contest. Johnson, supra, citing People v. McCray,(1985) 166 Cal.App.3d p.10.

In order to obtain relief for ineffective assistance of counsel, the burden is on the petitioner to establish that, counsel failed to act in a manner expected of a reasonably competent attorney acting as diligent advocates...[and] that counsels acts or omissions resulted in the withdrawal of a potentially meritorious defense. People v. Pope (1979) 23 Cal. 3d 412, 42. Strickland v. Washington, (1984) 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.)

In Hill v. Lockhart, (1985) 474 U.S. 52, 58, 106 S.Ct. 366, 369, 88 L.Ed2d 203, The United States Supreme Court

held that Strickland, supra, petitioner alleging ineffective assistance of counsel must show counsel's performance was deficient and resulted in prejudice. Furthermore,...there is a reasonable probability that, but for counsels errors, he would have insisted on going to trial. Counsel stated he had a report that showed the number of blows differed, as well as the use open hand and not a fist. Petitioner was not made aware that evidence. This was neither a tactical or strategic decision but a failure on counsel's part to defend his client and to communicate crucial information. Counsel told petitioner "we would not have to recite exactly what happened on the record in open court if we stipulated to a factual basis

People v. Spurlin, (1984) 156 Cal.App.3d.119, 126; Cal.Rptr. 663; Provocation sufficient to arouse the heat of passion required for voluntary manslaughter may be a single event, a series of events or prolonged conduct that leads to such a state. The victim told him she wanted only him, led him to leave his wife of seventeen years, but after he moved in with her, without his knowledge, she resumed her previous lifestyle. People v. Berry, (1976) 18 C.3d 509, 515; 134 Cal.Rptr. 415, 418 and In the present condition of our law it is left to the jurors to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the defendant did, or to create a reasonable doubt in their minds as to whether or not he did, commit his offense under a heat of passion. quoting from: People v. Logan, (1917) 175 Cal. 45, 48-49[164 p.1121] as a correct statement of law. People v. Valentine, (1946) 28 C.2d 121, 139: The fundamental of the inquiry is whether or not the Defendant's reason was, at the time of his act, so disturbed or obscured by some passion to such an extent as would render ordinary men of average disposition liable to act rashly or without due

deliberation and reflection, and from this passion rather than from judgment (n.4)

The Third District Court of Appeal in People v. Cameron, supra, 30 Cal.App.4th at p. 591, held that: As to the partial defense that defendant lacked intent to kill and the act occurred in the heat of passion, evidence of intoxication is cognizable. This defense requires provocation capable of arousing sufficient passion. Provocation was present in the actions of the victim on that night. Jealousy, arouses sufficient passion. The cause of this passion and jealousy was undisputed by the police reports and show that petitioner's counsel was deficient. He disregarded all this information and left off an offer to voluntary manslaughter. That deficiency resulted in the loss of a defense to the charge of second degree murder. Petitioner has satisfied the criteria of Pope, supra, Strickland, supra, and Hill, supra.

THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT ERRED IN AFFIRMING THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA DENYING PETITIONER'S CLAIM THAT HIS APPELLATE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE.

Petitioner was appointed an appellate attorney, Paul Carroll, on February 18, 1994 under the supervision of Florence Hoffman, a staff attorney for CCAP. Counsel was advised by Mrs. Hoffman to "federalize the breach of plea agreement.

Mr. Carroll asked for extensions of time because of a heavy case load, but the court of Appeal stated February 23, 1994, "Extensions of time for filing briefs may be denied unless supported by a detailed, factual showing of unusual circumstances. On December 15, 1994 Mrs. Hoffman sent Counsel a packet regarding filing a federal petition. On September 29, 1994 Counsel stated that the court had denied his appeal. "I do not intend to petition the court of appeal to reconsider its opinion." When asked why he did not raise the issues in the current writ, he replied that he felt they were frivolous. Anders v. State of California, 386 U.S. 738 (1967), petitioner's counsel withdrew from his case and failed to assist successor counsel.

The Panel Attorney Manual outlines the responsibilities of an assigned attorney. These are 1) to ensure a complete appellate record, present arguable grounds for reversal or modification of judgment in favor of the client. 2) Also, where evidence outside of the record exists that would justify relief, necessary ancillary proceedings such as a petition for writ of habeas corpus should be pursued.

On February 25, 1994, counsel was advised that petitioner's original claim could only be reached by habeas petition. "Your client claims that he was coerced into taking the plea by his defense counsel. He states that the DA had initially offered a plea to voluntary manslaughter and that defense counsel told him to hang on and later told him he would not defend him unless he pleaded to 2nd degree murder. Even though a certificate of probable cause was issued, I think the only way this issue can be reached is by way of habeas petition."

Counsel petitioned the Supreme Court of California for review and was denied January 4, 1995. Counsel advised

that the next step was to file a habeas petition in the federal court. This was not accurate, the state court must first be exhausted when issues outside the record are addressed. After asking counsel to continue the case and counsel's direction that he could not do any further work, petitioner sought another attorney. Petitioner wrote and asked Counsel to send his entire file and all things pertaining to his case to his wife on May 3, 1995. Petitioner hired another attorney on July 3, 1995 and a State habeas petition was started.

March 7, 1996 petitioner received the letter from counsel stating his case in the California courts was through and that he was sending his file. Counsel never requested an expanded appointment to do a habeas petition at the state level, which is the proper avenue to exhaust the state remedies on issues outside the record. Counsel delayed in communicating with the successor counsel and petitioner, thereby greatly harming petitioner's case.

Counsel stated he felt that the court of Appeal would not reconsider its finding. The Third District Court held that even though Bunnell error had occurred, petitioner had waived his right to show it. Counsel knew that petitioner desired to pursue the case. Counsel had been directed that a federal habeas petition should be filed. Petitioner had requested his entire file be sent to his wife so that he may pursue his case with another attorney in May of 1995. Petitioner finally received the necessary entire file in July of 1998. Petitioner could not proceed with this petition without the entire file and thus was delayed. Petitioner asserts that this failure to raise these claims, as well as to provide Petitioner with his file amounts to ineffective assistance of appellate counsel. Furthermore, Petitioner asserts that he was prejudiced by this ineffective assistance because, had

appellate counsel raised all meritorious claims, it was highly probable that Petitioner's conviction would have been reversed on appeal. Therefore, Petitioner asserts that he has shown that he did, in fact, receive ineffective assistance of appellate counsel and that he was actually prejudiced by this ineffective assistance.

CONCLUSION

Petitioner respectfully requests this Court find that Petitioner has made a substantial showing of the denial of his constitutional rights. Petitioner requests this Court reverse the Judgment of the Court of Appeal to deny the request for a certificate of appealability and provide Petitioner the opportunity for federal court review on the merits of his claims.

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeal for the Ninth Circuit in denying the petitioner's request for a Certificate of Appealability.

DATED:

Feb 9, 2004

By: Richard Dangler

RICHARD DANGLER
Counsel of Record

APPENDIX

A United States Court of Appeals for the Ninth Circuit-Order

B United States District Court for the Eastern District of California – Order

C Findings and Recommendations

Appendix A

FILED
SEPTEMEBER 26, 2003
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATE COURT OF APPEALS FOR THE NINTH CIRCUIT

BOBBY GENE HUNTER,
Petitioner- Appellant,
VS.

GLENN A. MUELLER, Warden, et. al.
Respondents-Appellees

No. 03-16044

D.C. No. CV-99-01544-EJG
(Eastern California)
Sacramento

ORDER

Before: B. FLETCHER and SILVERMAN, Circuit Judges.

The request for a certificate of appealability is denied. *See* U.S.C. section 2253(c)(2).

Appendix B

FILED
MAY 23, 2003
CLERK, US DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA
BY_____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

BOBBY GENE HUNTER,

No. CIV S-99-1544 EJG JFM P

Petitioner- Appellant,

VS.

GLENN A. MUELLER, Warden, et. al.
Respondents-Appellees

ORDER

Petitioner, a state prisoner proceeding through counsel, has timely filed a notice of appeal of this court's March 18, 2003 denial of his application for a writ of habeas corpus together with a request for a certificate of appealability pursuant to 28 U.S.C. section 2253(c).

A certificate of appealability may issue under 28 U.S.C. section 2253 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. section 2253(c)(2). The court must either issue a certificate of appealability indicating which issues satisfy the

required showing or must state reasons why such a certificate should not issue. Fed. R. App. P. 22(b).

For the reasons set forth in the magistrate judge's February 6, 2003 finding and recommendations, petitioner has not made a substantial showing of the denial of a constitutional right. Accordingly, a certificate of appealability should not issue in this action.

In accordance with the above, IT IS HEREBY ORDERED that petitioner's April 8, 2003 request for a certificate of appealability is denied.

DATED: May 22, 2003

"s/ Edward J. Garcia"
UNITED STATES DISTRICT JUDGE

Appendix C

FILED
FEB – 6 2003
CLERK U.S. DISTRICT COURT EASTERN DISTRICT OF CALIFORNIA
BY _____
DEPUTY CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA

BOBBY GENE HUNTER,
PETITIONER, No. CIV S-99-1544 EJG JFM P

VS.

GLENN A. MUELLER, ET AL.
RESPONDENTS

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding through counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. section 2254. Petitioner challenges his 1993 conviction, entered pursuant to a plea of no contest, for second degree murder. Petitioner claims that (1) his no contest plea was entered in violation of several of his constitutional rights; and (2) he received constitutionally ineffective assistance of both trial and appellate counsel.

FACTS[1]

> Oroville police officers were dispatched to Josephine Schain's residence in response to a call of domestic abuse. When they arrived they saw the petitioner through a winow. He was sitting atop Ms. Schain and hitting her with his fists, repeating "tell the truth." Petitioner answered the door when the officers knocked. He looked tired, was sweating heavily, and had a strong odor of alcohol. Ms Schain had numerous contusions and obvious swelling to her head. She was taken to a hospital and died a few days later from the beating she received.

(People v. Hunter, slip op. at 2.)

PROCEDURAL BACKGROUND

On August 10, 1993, a felony complaint was filed in the Municipal Court in Butte County, charging petitioner with murder in the death of Josephine Schain. On October 14, 1993, a preliminary hearing was held in Butte County Superior Court. Subsequently, on October 21, 1993, an information was filed in Butte County Superior Court charging petitioner with one count of murder. Trial was set for December 1993. On December 1, 1993, petitioner entered a negotiated plea of no contest to one count of second degree murder. On

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[1] The facts are taken from the opinion of the California Court of Appeal for the Third Appellate District in People v.Hunter, No. C0147582 (Sep. 23, 1994), appended as Exhibit 3 to Respondents' Answer, filed September 15, 2000.

January 5, 1994, petitioner was sentenced to fifteen years to life in prison, a $10,000.00 fine, and lifetime parole.

Petitioner appealed his conviction and sentence to the California Court of Appeal for the Third Appellate District. On direct appeal, petitioner contended that (1) the lifetime parole term violated his plea bargain; (2) his lawyer was ineffective for failing to object to the life parole term; (3) the court erred in denying probation based on a finding that petitioner was a danger to others; and (4) the court erred in failing to determine petitioner's ability to pay the restitution fine. By order filed September 23, 1994, the state court of appeal affirmed petitioner's conviction and sentence, and on January 4, 1995, the California Supreme Court denied review.

On October 9, 1996, petitioner filed a petition for writ of habeas corpus in the Butte County Superior Court raising, inter alia, the claims raised in the instant petition. On July 3, 1997, the superior court conducted an evidentiary hearing, and on July 14, 1997, the court denied the petition. (Petitioner's Exhibits I3 and J3.) Thereafter, petitions for writ of habeas corpus were filed in, and denied by, the California Court of Appeal for the Third Appellate District and the California Supreme Court. Both courts denied the petitions in orders that contained no statement of reasons. (Respondents' Exhibit 7, at ii; Respondents' Exhibit 8.)

ANALYSIS

1. General Standards

Federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.
28 U.S.C. section 2254(d)
"A state court decision is 'contrary to' [clearly established United States Supreme Court] precedents if it 'applies a rule that contradicts the governing law set forth in [United States Supreme Court] cases' or if it 'confronts a set of facts that are materially indistinguishable from a decision of [the United States Supreme] Court and nevertheless arrives at a result different from [United States Supreme court] precedent.'" Early v. Packer __U.S.__, 123 S.Ct. 362, 365 (U.S. Nov. 4, 2002) quoting Williams v. Taylor, 529 U.S. 362, 405-406, 120 S. Ct. 1495 (2000)).

A state court decision involves an "unreasonable application" of federal law "when the state court's application of clearly established federal law is 'objectively unreasonable.'" Shackelford v. Hubbard, 234 F. 3d 1072, 1077 (9th Cir. 2000) citing Williams, 120 S.Ct. at 1521). A state court's application of federal law is objectively unreasonable when it is "clearly erroneous," that is, where the federal court is "left 'with a "firm conviction" that one answer, the one rejected by the state court, was correct and the other, the application of the federal law that the state court adopted was erroneous....'" Shackelford, id (quoting Van Tran, 212 F. 3d at 1152-54.

The court looks to the last reasoned state court decision as the basis for the state court judgment. Avila v. Galaza, 297 F. 3d 911, 918 (9th Cir. 2002). Where there is no reasoned state court decision

rejecting a claim, "an independent review of the record is required to determine whether" habeas corpus relief under 2254(d). Delgado v. Lewis, 223 F. 3d 976, 982 (9th Cir. 2000).

II. Petitioner's Claims

A. Validity of Petitioner's No Contest Plea

Petitioner's first claim for relief is that his no contest plea was constitutionally invalid because (1) he was not advised of either the true nature of the charges to which he was pleading guilty nor the consequences of his plea; (2) he was not competent to enter the plea because he was being treated for major depression; and (3) the trial court failed to ensure that petitioner understood the charges against him and to advise petitioner of his rights.

A guilty plea to criminal charges must be knowing, intelligent and voluntary. Brady v. United States, 397 U.S. 742, 748 (1970).[2] In relevant part, in order for a plea to be voluntary, the record must contain proof that petitioner received "real notice of the true nature of the charge against him,'" Henderson v. Morgan, 426 U.S. 637, 645 (1975) (quoting Smith v. O'Grady, 312 U.S. 329, 334 (1941)), or that he in fact understood the charged. Henderson, at 645 n. 13. The record must also reflect petitioner's awareness "of the direct consequences of [the] plea. Torrey v. Estelle, 842 F. 2d 234, 235 (9th Cir. 1988) emphasis

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[2] Under California law, a plea of nolo contedere has the same effect as a plea of guilty. See, e.g., People v. West, 3 Cal. 3d 595 (1970). Accordingly, federal constitutional principles governing guilty pleas apply to petitioner's claims in the instant case. Miller v. McCarthy, 607 F. 2d 854, 856 (1979).

added to original); see also Brady v. United States, 397 U.S. 742, 755, 90 S. Ct. 1463, 25 Le. Ed. 2d 747 (1970). The record must also reflect knowing and intelligent waiver of the constitutional protections enumerated in Boykin v. Alabama, 395 U.S. 238, 242-44 (1969). Finally, due process requires that the defendant be competent at the time the plea is entered. See Miles v. Stainer, 108 F. 3d 1109, 1112 (9th Cir. 1997.) "When analyzing competence to plead guilty, [the courts] look to whether a defendant has 'the ability to make a reasoned choice among the alternatives presented to him.'" Id. (quoting Chavez v. United States, 656 F. 2d 512, 518 (9th Cir. 1981.)

"The voluntariness of [petitioner's no contest] plea can be determined only by considering all of the relevant circumstances surrounding it." Brady, 397 U.S. at 749. In Blackledge v. Allison, 431 U.S. 63 (1977), the Supreme Court addressed the presumption of verity to be given the plea proceeding record when the plea is subsequently challenged in a collateral proceeding. While noting that the defendant's representations at the time of his plea are not "invariably insurmountable" when challenging the voluntariness of his plea, the Court stated that, nonetheless, the defendant's representations, as well as any findings made by the judge accepting the plea, "constitute a formidable barrier in any subsequent collateral proceedings. Solemn declarations in open court carry a strong presumption of varity." Id. at 74.

Petitioner's first contention is that he was never informed that intent to kill was an element of the charge of second degree murder and that he would not have entered the plea had he known he was admitting an intent to kill the victim. The transcript of proceedings from the entry of petitioner's no contest plea contains the following exchange between

the trial court, petitioner, and petitioner's counsel, Leo Battle:

THE COURT: All right, this is action CM 3294. The defendant is charged in the information with open count of murder, and there is going to be a stipulation it will be designated murder in the second degree, is that correct?

MR. BATTLE: That is affirmative.

THE COURT: As amended, does your client waive formal advisement of rights, formal arraignment and further reading of information?

MR. BATTLE: Yes.

THE COURT: Mr. Hunter, how old are you?

MR. HUNTER: 39.

THE COURT: How far have you gone through school?

MR. HUNTER: I quit in the tenth grade.

THE COURT: You do read and write the English language though, is that correct?

MR. HUNTER: Yes, sir.

THE COURT: Did you read and understand the plea form prior to initialing it then ultimately signing it?

MR. HUNTER: Yes sir.

THE COURT: Now you have heard that the negotiated settlement is basically this will be designated as second degree murder.
Is that your understanding of the negotiated settlement?

MR. HUNTER: Yes sir.

THE COURT: All right, other than what is contained in the negotiated settlement, has anyone made any promises or representations to you of lesser sentence, probation, reward, immunity or any other advantage for you or anyone else in order to get you to enter this plea?

MR. HUNTER: No sir.

THE COURT: Are counsel aware of any other promises or representations made to the defendant?

MR. BATTLE: No.

THE COURT: Mr. Hunter, are you presently under the influence of alcohol or any drug or narcotic or prescription medication.

MR. HUNTER: No sir.

THE COURT: All right, Mr. Battle, have you explained to your client what the prosecution must prove in order for him to be found guilty of the charges to which he is pleading no contest?

MR. BATTLE: Yes.

THE COURT: Mr. Hunter, do you have any questions regarding the negotiated disposition?

MR. HUNTER: No sir.

THE COURT: Have you had enough time to talk to Mr. Battle about this matter?

MR. HUNTER: Yes, sir.

(Court Reporter's Transcript on Appeal (CRT), Volume 1 of 1, at 2-4.) The transcript shows that petitioner's counsel represented to the court that he had explained the charges to petitioner. Petitioner's counsel also signed a statement that, inter alia, he explained the charges to petitioner. (Clerk's Transcript on Appeal (CT), at 40.) The attorney's statement accompanied petitioner's written declaration and waiver of rights completed and signed in connection with entry of his no contest plea. (CT at 37-40.)

Here, as in his state habeas petitions, petitioner contends that none of the explanations he received included information that second degree murder requires an intent to kill.[3] At the evidentiary

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[3] Under California law, the elements of second degree murder are: (1) an unlawful killing: (2) accomplished with malice aforethought, whether express or implied. (People v. Malfavon, 102 Cal. App. 4th 727, 735 (2002) (citing People v. Swain (1996) 12 Cal. 4th 593, 600). Under an implied malice theory of second degree murder, no showing of intent to kill is required. See Swain, at 603 (quoting CALJIC No. 8.31.) "[U]nder an implied malice theory of second degree murder, the requisite mental state for murder-malice aforethought – is by definition 'implied,' as a matter of law, from the specific intent to do some act dangerous to human life *together with the circumstance that a killing has resulted from the doing of such act.*" Id. (emphasis in original.) It appears that the predicate of petitioner's claim – that his no contest plea necessarily constituted an admission that he intended to kill the victim – is not in accordance with California law; his plea can also be viewed as an admission that

hearing in state court, petitioner's trial counsel testified that he "went through with petitioner on several occasions the distinctions between first degree murder, second degree murder, premeditation, deliberation, malice aforethought, intent to kill, how intent to kill could be implied from an act, malice could be either express or implied." (Petitioner's Exhibit I3, at 128.) Counsel also testified that petitioner never indicated he did not understand what was being discussed. (Id. at 129.) In denying the petition, the state superior court judge specifically found Mr. Battle's testimony credible. (Petitioner's Exhibit J3, at 29.)

The state court's factual finding that petitioner's counsel did advise petitioner of the elements of second degree murder, including the required mental state, is presumed correction on this record and can only be rebutted by clear and convincing evidence to the contrary. See 28 U.S.C. section 2254(e)(1). Petitioner has failed to present evidence sufficient to rebut the presumption of correctness that attaches to this factual determination. The state court's factual determination is therefore dispositive of the first aspect of petitioner's claim that his no contest plea was involuntary. This aspect of petitioner's first claim for relief should be denied.

Petitioner also contends that he was not competent to enter a no contest plea because he was being treated with Elavil for major depression at the time he entered the plea and, therefore, that his due process rights were violated by the trial court's acceptance of the plea.

Due process requires a trial court to hold a competency hearing sua sponte whenever the

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he intended to commit an act dangerous to the victim's life and that her death resulted from that act.

evidence before it raises a reasonable doubt whether a defendant is mentally competent. Pate v. Robinson, 383 U.S. 375, 86 S. Ct. 836, 842, 15 L. Ed. 2d 815 (1966); Hernandez v. Ylst, 930 F. 2d 714, 716 (9th Cir. 1991); Chavez v. United States, 656 F. 2d 512, 515 (9th Cir. 1981). Competence is defined as the ability to understand the proceedings and to assist counsel in preparing a defense. Dusky v. United States, 362 U.S. 402, 402, 80 S.Ct. 788, 4 L.Ed. 2d 824 (1960); see also Godinez v. Moran, 509 U.S. 389, 396, 113 S.Ct. 2680, 2685, 125 L.Ed. 2d 321 (1993). When analyzing competence to plead guilty, we look to whether a defendant has "the ability to make a reasoned choice among the alternatives presented to him." Chavez, 656 F. 2d at 518. Even so, this standard is no higher than the Dusky standard for competence to stand trial. See Godinez, 509 U.S. at 402, 113 S.Ct. at 2688.

Whether a defendant is capable of understanding the proceedings and assisting counsel is dependent upon evidence of the defendant's irrational behavior, his demeanor in court, and any prior medical opinions on his competence. Drope v. Missouri, 420 U.S. 162, 180, 95 S.Ct. 896, 908, 43 L.Ed. 2d 103 (1975). None of these factors is determinative. Any one of them may be sufficient to raise a reasonable doubt about competence. Id.

Miles v. Stainer, 108 F. 3d 1109, 1112 (9th Cir. 1997).

The record reflects that, at the time he entered his plea petitioner, both orally and in writing, denied being under the influence of medication to the extent that his judgment was impaired. (See CRT at 4; CT at 40.) There is no evidence of any conduct by petitioner or other information that would have put

the trial court on notice that a competency hearing was required prior to the entry of the plea.

In his state habeas petition, petitioner challenged his plea on the ground, inter alia, that medication he was taking for his diagnosed depression precluded entry of a voluntary and intelligent plea. The state superior court heard testimony on this issue at the evidentiary hearing conducted on the petition and specifically found after hearing that petitioner "was not under the influence of Elavil to the extent that it would interfere with his ability to make a knowingly [sic], voluntarily [sic], and intelligent plea." (Petitioner's Exhibit J3, at 29.) Petitioner has failed to demonstrate that this finding was based on an unreasonable determination of the facts, nor does this court find that the state court's rejection of this claim was based on an unreasonable application of clearly established federal law.

Petitioner did not squarely allege that he was incompetent at the time he entered his plea and entitled therefore to a competency hearing prior to entry of the plea until the petition for writ of habeas corpus that he filed in the California Supreme Court. (See Exhibit 5 and 7 to Respondent's Answer.) That petition was denied in a silent denial without an evidentiary hearing. (Exhibit 8 to Respondent's Answer.) However, petitioner relied on the same factual predicate to support this contention as he did to support his more general challenge to the voluntariness of his plea: he contends that his mental state and the Elavil prescribed therefore rendered him incompetent to enter a plea. The state superior court's factual findings are presumed correct on the question of whether the medication rendered petitioner incapable of making a voluntary choice

among the options available to him, and petitioner has failed to present persuasive evidence to the contrary.[4]

Finally, petitioner claims that the trial court failed to ensure that petitioner understood the charges against him and failed to advise him of his rights. This claim is, in essence, a reiteration of petitioner's contentions that he did not understand the charges against him and that his no contest plea was rendered involuntary by the medication he was taking and by his mental state at the time he entered the plea. Those contentions should be rejected for the reasons discussed, supra.

To the extent that petitioner asserts simply that the trial court did not obtain an oral waiver of rights from petitioner and that the trial court failed to advise him of the charges against him, the contention is without merit. The oral colloquy set forth supra adequately demonstrates that petitioner received notice of the charges against him prior to entry of the plea. In addition, as noted above, prior to entering his plea, petitioner completed and signed a written declaration and waiver of rights in connection with the entry of his plea. (CT at 37-40.) Included in the written waiver was a list of constitutional rights given up by entry of the plea. (Id. at 38.) Petitioner's initials by each right listed indicate both his understanding of the right and his waiver thereof.

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[4] Petitioner contends that at the evidentiary hearing the state superior court improperly put the burden of proving incompetence on him and that in fact the state was required to prove that he was competent. As a threshold matter, the court notes that the principal witness on whom the state superior court relied in making its finding was the jail psychiatrist, Dr. Fithian, who was called by petitioner as a witness at the evidentiary hearing. (See Petitioner's Exhibit I-3.) In any event, the court needn't address the question of whether the burden of proof was properly allocated because the factual findings are plainly supported by the evidentiary record.

(Id.) Where, as here, the record otherwise discloses the voluntary and intelligent nature of petitioner's no contest plea, the written waiver is sufficient to satisfy the requirements of Boykin v. Alabama, 395 U.S. 238 (1969). See Rodriguez v. Ricketts, 798 F. 2d 1250, 1254 (9th Cir. 1986.) (citations omitted) ("Boykin does not require the state court to enumerate all of the rights a defendant waives as long as the record indicates that the plea was entered voluntarily and understandingly.")

For all of the foregoing reasons, petitioner's first claim for relief should be denied.

B. Ineffective Assistance of Trial Counsel.

The two-part Strickland test applies to claims of ineffective assistance of counsel in the context of convictions obtained pursuant to a guilty plea. See Hill v. Lockhart, 474 U.S. 52 (1985).

Petitioner's first contention is that his trial attorney failed to pursue an offer from the district attorney allowing petitioner to plead guilty to voluntary manslaughter. There is no evidence that such an offer was ever made. The only evidence to support this contention is petitioner's own description of a written communication to him from his attorney at the end of his preliminary hearing, from which petitioner inferred that such an offer had been made. (See Petitioner's Exhibit A, Declaration of Bobby Gene Hunter.) At the state court evidentiary hearing, petitioner's trial counsel testified that he worked unsuccessfully to try to get such an offer for petitioner. (See Petitioner's Exhibit I-3 at 147.) Petitioner's evidentiary hearing testimony mirrored that contained in his declaration, but on cross-examination petitioner admitted that he had never

heard the offer directly from the district attorney. (Id. at 203.)

This court find that the evidence is insufficient to support petitioner's claim that such an offer was made or that counsel was ineffective in his efforts to obtain such a plea deal for petitioner.

Petitioner's second contention is that his counsel was ineffective in failing to investigate his mental state or to seek a diagnostic evaluation after indicating on the change of plea form that one could be requested. Petitioner also contends that his counsel was ineffective for failing to investigate the effects on petitioner of the medication he was taking at the time he entered his plea. For the reasons set forth in section I, supra, neither petitioner's mental state nor the prescribed medication rendered his plea involuntary. Petitioner has made no showing that the outcome of the proceedings would have been different had counsel investigate his mental state or the medication prescribed therefore, or requested a diagnostic evaluation.

Petitioner's third contention is that counsel knew petitioner's Miranda rights had been violated. Petitioner offers no substantive description of the nature of the Miranda violation nor any explanation of how counsel's performance might have been ineffective in connection with any such alleged violation.

Petitioner's fourth contention is that counsel was ineffective in failing to explain to him that one of the consequences of his plea would be lifetime parole. The written waiver signed by petitioner states that the maximum sentence he would receive was fifteen years to life in prison and 36 months parole. (CT at 38.) Following the state evidentiary hearing and rejected this claim of ineffective assistance of counsel. (Petitioner's Exhibit J-3 at 30.) Petitioner

has failed to present evidence sufficient to rebut the presumption of correctness that attaches to the state court's factual finding.[5]

Petitioner also contends that counsel was ineffective in advising him to plead guilty to second degree murder when petitioner had several viable defenses to the charges he was facing. Petitioner had not demonstrated that counsel's advise to take the plea offer was, under the circumstances, outside the bounds of reasonable professional assistance.

Petitioner also contends that his trial counsel failed to review the pre-sentence report with petitioner to correct errors allegedly contained therein. Petitioner apparently contends that this led to the denial of probation because the parties stipulated that the factual basis for the plea was in the probation report and the police reports. Petitioner has failed to establish that review by counsel would have led to the correction of any alleged errors in a way that would have changed the outcome of his prison sentence.

For all of the foregoing reasons, petitioner's claim of ineffective assistance of counsel should be denied.

C. Henderson/Bigman Error

Petitioner's third claim for relief is a reiteration of his claim that his no contest plea is invalid because he was unaware of the nature of the intent element of the crime of second degree murder.

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[5] Petitioner also claims trial court error in allowing him to sign the form without advising him correctly about the life parole term. Petitioner was advised by the trial court that his maximum possible punishment was life in prison, and he was correctly advised by his attorney about the life parole term. Under these circumstances, the trial court's failure to correct the error in the written waiver form does not entitle petitioner to federal habeas corpus relief.

Although he characterizes this claim as one of Henderson/Bigman error[6], it is essentially the same contention as that raised in his first claim for relief. See Section IIA, supra. For the reasons set forth in that section, the claim should be denied.

D. Ineffective Assistance of Appellate Counsel

Petitioner's fourth claim for relief is that he received ineffective assistance of appellate counsel when his first appellate counsel failed to raise several issues in a petition for writ of habeas corpus and caused his pursuit of federal habeas relief to be delayed. Petitioner has failed to show any prejudice from the alleged omissions. This claim should be denied.

E. The Trial Court Abuse of Discretion in Denying State Habeas Petition.

Petitioner's final claim is that he state trial court abused its discretion in denying his state habeas petition. While petitioner is free to contend that the state court erred in its application of clearly established federal law with respect to any habeas claims raised in state court, a contention that the state court erred in denying a state habeas petition is not, by itself, grounds for federal habeas corpus relief. To the extent that this claim reiterates arguments raised in petitioner's other claims for relief it should, for the reasons set forth supra, be denied.

For all of the foregoing reasons, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be denied.

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[6] Henderson v. Morgan, 426 U.S. 637 (1976); United States v. Bigman, 906 F. 2d 392 (9th Cir. 1990.)

These findings and recommendations are submitted to the United States District Judge assigned to this case, pursuant to the provision of 28 U.S.C. section 636(b)(1).

"s/ Magistrate Judge John F. Moulds."

(2)

No. 03-1226

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IN THE SUPREME COURT OF THE UNITED STATES

BOBBY GENE HUNTER, *Petitioner,*

v.

GLENN A. MUELLER, Warden et al., *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can Petitioner contest the denial of his petition for a federal writ of habeas corpus and of his request for a Certificate of Appealability where the operative facts, as reasonably determined by the state court, and the relevant legal precedent will not support a debate that Petitioner has been denied any constitutional right?

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IN THE SUPREME COURT OF THE UNITED STATES

No. 03-1226

BOBBY GENE HUNTER, *Petitioner,*

v.

GLENN A. MUELLER, Warden et al., *Respondent.*

STATEMENT OF THE CASE

On December 1, 1993, pursuant to a negotiated plea in which his counsel joined, Petitioner Bobby Gene Hunter pled nolo contendere to a charge of second degree murder (Cal. Penal Code §§ 187, subd. (a), and 189)[1/] in the Butte County Superior Court. (CT 11-12, 36-41; RT 8-9.) In an unpublished opinion filed on September 23, 1994, the Court of Appeal of the State of California, Third Appellate District, affirmed Petitioner's conviction. The California Supreme Court denied review.

Some 21 months after the denial of review, Petitioner, represented by counsel, filed a petition for writ of habeas corpus in the Butte County Superior Court, alleging violations of various constitutional rights. An evidentiary hearing on Petitioner's claims was held, following which the court denied the petition on July 14, 1997. Almost a year later, on July 2, 1998, Petitioner, still represented by counsel, filed an

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1. Unless otherwise designated, all statutory references are to the California Penal Code.

unsuccessful petition in the state court of appeal, essentially repeating his claims from the superior court pleading. A third petition filed in the California Supreme Court was denied on March 31, 1999.

On August 9, 1999, Petitioner filed an application for writ of habeas corpus in the United States District Court for the Eastern District of California. On March 18, 2003, that Court denied the application. For the reasons set forth in the magistrate judge's findings and recommendations, the Court subsequently determined that Petitioner had not made a substantial showing of the denial of a constitutional right. Consequently, Petitioner's request for a certificate of appealability was also denied. A second request for a certificate addressed to the United States Court of Appeals for the Ninth Circuit was denied as well.

STATEMENT OF FACTS

The facts of Petitioner's substantive offense were set forth in the unpublished opinion of the state appellate court:

> Oroville police officers were dispatched to Josephine Schain's residence in response to a call of domestic abuse. When they arrived they saw [Petitioner] through a window. He was sitting atop Ms. Schain and hitting her with his fists, repeating "tell the truth." [Petitioner] answered the door when the officers knocked. He looked tired, was sweating heavily, and had a strong odor of alcohol. Ms. Schain had numerous contusions and obvious swelling to her head. She was taken to a hospital and died a few days later from the beating she had received.

People v. Hunter, C017582 (filed September 23, 1994), Slip Opn. at 2.

ARGUMENT

THE COURT OF APPEALS PROPERLY DECLINED PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY BECAUSE NEITHER THE FACTS NOR THE LAW SUPPORT ANY DEBATABLE SHOWING THAT PETITIONER WAS DEPRIVED OF ANY CONSTITUTIONAL RIGHT

Petitioner contends that this Court should grant certiorari to determine whether the United States Court of Appeals for the Ninth Circuit erred in denying his request for a Certificate of Appealability ["COA"] in order to obtain review of his claims presented to the District Court on federal habeas. Pet. at 3, 28. Respondent submits that no review is required. Other than his own assertion that he made a substantial showing that he was denied various constitutional rights, Petitioner has not demonstrated that any reasonable jurist would debate whether the Court has misapplied any controlling precedent or that the factual predicate underlying the court's denial was unreasonably determined. To the contrary, the court of appeals acted as constrained by statute to deny a COA where an applicant has failed to make a substantial showing that he has been denied a constitutional right. 28 U.S.C. § 2253(c).

At issue in this case are the standards imposed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2253, before a petitioner may appeal a federal district court's denial of habeas relief. Such an appeal is not automatic, but is governed by the COA requirements found at 28 U.S.C. § 2253(c). *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 146 L.Ed.2d 542 (2000). Under those provisions, a petitioner may not appeal absent a COA, and such a certificate should not issue unless the prisoner makes a

substantial showing that he has been denied a constitutional right. 28 U.S.C. § 2253(c)(2).

This provision is a codification of the standard announced in *Barefoot v. Estelle*, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), for determining what constitutes the requisite showing to trigger appellate review of the denial of federal habeas relief. *Slack*, 529 U.S. at 483. Under the *Barefoot* standard, to secure a certificate of probable cause -- the predecessor to the current Certificate of Appealability -- a petitioner was required to show more than the absence of frivolity or the presence of good faith. *Barefoot*, 463 U.S. at 893. Rather, the requisite showing was that reasonable jurists could debate whether the issues should have been resolved differently or that the questions are adequate to deserve encouragement to proceed further. *Id.*; *accord Slack*, 529 U.S. at 484.

In deciding whether to permit a petitioner to initiate appellate review of the denial of his habeas petition, the court of appeals must limit its examination to a threshold inquiry into the underlying merits of the petitioner's claims. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003), *citing Slack*, 529 U.S. at 481; *Hohn v. United States*, 524 U.S. 236, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). In making this decision, the court of appeals is not to impose the standards requiring a petitioner to prove the state court decision was objectively unreasonable, which applies to the granting of habeas relief. *Miller-El*, 537 U.S. at 341. Rather, a petitioner need demonstrate only that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Id.* at 338, *quoting Slack*, 529 U.S. at 484. "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Miller-El* at 342.

Apply these principles to this case, the court of appeals below correctly declined to issue the COA. That court could justifiably find that Petitioner had failed to demonstrate the debatability of his claims, as they were either without factual

support or even contrary to law. This Court should agree. Petitioner has not made a substantial showing that his plea was involuntary or that he received ineffective assistance of counsel.

A. Validity Of Plea

Petitioner contends the court erred in denying the claim that his due process rights were violated. Pet. at 5. This contention is basically a claim that Petitioner's no contest plea was invalid because he was not advised of the true nature of the charges against him or the consequences of his plea, he was not competent to enter the plea (Pet. at 8) and the trial court failed to ensure that Petitioner understood the charges against him and to advise him of his rights (Pet. at 9). A threshold inquiry into these claims supports the view of the court of appeals that none of these claims would be debatable among reasonable jurists.

To meet the constitutional requirement that a guilty plea must be knowing, intelligent, and voluntary (*Brady v. U.S.*, 397 U.S. 742, 748, 90 S.Ct. 1463, 1469, 25 L.Ed.2d 747 (1970)), and represent a voluntary and intelligent choice among the available alternatives (*Hill v. Lockhart*, 474 U.S. 52, 56, 106 S.Ct. 366, 369, 88 L.Ed.2d 203 (1985)), a defendant must be apprised of the true nature of the charge(s) against him (*Henderson v. Morgan*, 426 U.S. 637, 645, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976)), and of the consequences of his plea (*Boykin v. Alabama*, 395 U.S. 238, 243-244 (1969)). The record must reflect a knowing and intelligent waiver of the constitutional protections enumerated in *Boykin*. *Id.* at 242-244. And underlying these requirements is the fundamental premise that a defendant be competent to plead. *See Dusky v. U.S.*, 362 U.S. 402, 80 S.Ct. 788, 41 L.Ed.2d 824 (1960) [defendant is competent if he is able to understand the nature of the proceedings and to assist counsel in rational manner]; *also Godinez v. Moran*, 509 U.S. 389, 113 S.Ct. 2680, 125 L.Ed.2d 321 (1993) [no higher competency standard for pleading guilty than for standing trial]. Petitioner has made an inadequate

showing that the district court's assessment of these issues was debatable, much less wrong.

1. Competency To Plead

Petitioner contends that the post-conviction evidentiary hearing on his competency to plead was constitutionally inadequate because the judge erroneously allocated to him the burden of proving incompetence rather than to the state the burden of proving competence. He asserts that the state must bear that burden of retrospectively proving competency if the trial court failed to provide a defendant with the constitutionally required competency hearing. Pet. at 10. Petitioner apparently takes the position, relying on *Pate v. Robinson*, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), that the trial court had a sua sponte duty to hold a hearing concerning Petitioner's competency before taking his plea (Pet. at 11-12):

> In every case where our court or the Supreme Court has addressed the sufficiency of the evidence for making a retrospective determination, we have affirmed the view that the state bears the burden of proving competence.

Pet. at 12. Petitioner mistakes the law.

This Court has expressly acknowledged that due process is not violated by the presumption that a criminal defendant is competent unless he proves otherwise by a preponderance of the evidence. *Medina v. California*, 505 U.S. 437, 445, 112 S.Ct. 2572, 120 L.Ed.2d 353 (1992). Thus, due process does permit a state to require the defendant to bear the burden of proof on the competency issue by a preponderance of the evidence. *Id.* at 442-453. A different result is not warranted simply because the evidentiary hearing arose in the context of a post-conviction hearing on collateral review. Indeed, it is a fundamental tenet of federal habeas litigation that the burden of proving a violation of the Constitution within the meaning of section 2254

rests entirely with the petitioner. *Herrera v. Collins*, 506 U.S. 390, 399-400, 404-405, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993). Because Petitioner's claim of error regarding this post-conviction competency hearing was based largely on the erroneous legal view that the state rather than he had the burden of proof, Petitioner has not shown he was denied a constitutional right.

Nor does Petitioner fare any better with respect to his claim concerning the alleged sua sponte duty of the trial court to test his competency before accepting Petitioner's plea. *Pate* requires such a hearing only if a bona fide doubt of competency arises. *Pate*, 383 U.S. at 384. In making that assessment, the federal court considers only what was before the judge accepting the plea. *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 489 (9th Cir. 1997). In this case, nothing before the trial court would have triggered that inquiry (Pet. Appen. C at 11-12), thus the federal court of appeals could determine there was no debatable issue concerning competency.

Petitioner now contends there was evidence in the probation report that he was under the influence of drugs and unstable. Pet. at 13. However, even assuming that was true, nothing in the report ties this description to the relevant time of the plea. In fact, in the written change of plea form executed by Petitioner, he claimed to be sober and denied that he had consumed any drug or narcotic to the extent his judgment was impaired at that time. (Clerk's Transcript on Appeal ["CT"] 40.) When specifically asked in open court at the time of his plea about his sobriety, Petitioner again denied that he was then under the influence of alcohol or any drug or narcotic or prescription medication. Furthermore, there was nothing about Petitioner's behavior in court that would have triggered the trial judge's suspicion about Petitioner's competence. Absent any grounds to trigger the suspicion, the court of appeals correctly concluded there was no basis for debate on whether the trial judge should have held a *Pate* hearing.

In sum, Petitioner made no showing of fact or law that would have led any reasonable jurist to question whether the competency issue had been resolved correctly. Accordingly, there was no substantial showing he was denied a constitutional right and the COA was properly denied as to this issue.

2. Validity Of Plea Procedure

Aside from the issue of his competence to plead, Petitioner also alleges his plea was constitutionally invalid because he was not advised of the true nature or consequences of his plea and also apparently because the trial court failed to ensure Petitioner understood the charges against him or to advise him of his rights. Specifically, he claims he would not have pled no contest to second degree murder had he known the charge meant he intended to kill the victim (Pet. at 6) or that he killed with malice aforethought (Pet. at 8). He further questions whether the record of plea proceedings affirmatively shows a knowing, voluntary waiver of constitutional rights (Pet. at 8), asserting there is no evidence on the record to show he was aware of the substantive rights enumerated in *Boykin* (Pet. at 10). Respondent submits that Petitioner has offered nothing other than his self-serving assertions to provide any debate concerning these issues.

Starting with this last and most easily disproved claim that he was unaware of the substantive rights enumerated in *Boykin*, the record permits no legitimate debate. First, Petitioner executed a written change of plea form under penalty of perjury in which each of the constitutional rights given up by the plea -- right to a speedy, public trial by jury, right to confront and cross-examine witnesses, right to remain silent unless he chose to testify on his own behalf, and right to present evidence and to subpoena witnesses -- was expressly enumerated. Petitioner initialed separate boxes as to each right indicating both that he understood the right and that he waived it. (CT 38.) Petitioner also initialed that he had read, understood, and initialed those

items, and his attorney signed a statement indicating he had gone over the form with Petitioner and had explained to his client each of his rights and the consequences of the plea. (CT 40.) In court at the plea proceedings, Petitioner affirmed that he had read and understood the plea form prior to initialing and signing it. (Reporter's Transcript on Appeal [RT] 3). Thus, there is no question for reasonable jurists to debate concerning whether Petitioner was aware of his constitutional rights or that he personally -- not counsel -- waived them.

Nor has Petitioner made the requisite showing concerning his lack of knowledge of the nature of the charge to which he pled. Preliminarily, to the extent Petitioner's claim is based on the premise that his admission to second degree murder necessarily meant he intended to kill the victim, this predicate has no basis in California law. Under California law, an unlawful killing with malice is murder, regardless of whether there was an intent to kill. *People v. Lasko*, 23 Cal.4th 101, 108-109 (2000); *People v. Nieto Benitez*, 4 Cal.4th 91, 102 (1992).

As for Petitioner's assertion that he did not know pleading to second degree murder was an admission of malice, Respondent submits this bare bones assertion provides no basis for debate in light of the contemporaneous record. In his signed statement accompanying Petitioner's written change-of-plea form, Petitioner's attorney indicated, among other things, that he had explained the elements of the offenses. (CT 40.) In court, counsel affirmed that he had explained to Petitioner what the prosecution had to prove in order for Petitioner to be found guilty of the admitted charge. (RT 4.) Under this Court's precedent, even without counsel's representation on the record, it is presumed that defense counsel routinely explain to the client the nature of the offense in sufficient detail to give the accused notice of what he is being asked to admit. *Henderson v. Morgan*, 426 U.S. at 647; *accord Marshall v. Lonberger*, 459 U.S. 422, 436-437, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983).

Nor did Petitioner strengthen his showing in state post-conviction proceedings. There, trial counsel testified that, on several occasions, he discussed with Petitioner the distinctions between murder and manslaughter and also explained both malice and intent to kill. Pet. Appen. C at 9-10. At that hearing, he offered a letter from his trial file containing extensive briefing on the elements of both murder and manslaughter and on how the specific facts of Petitioner's case pertained to those elements. Against the contemporaneous record and the post-conviction testimony indicating that he had been advised of the nature of the charges against him, Petitioner offers only his denial that it happened in support of his claim that his plea was unknowing. Pet. at 8.

The substance of this showing pales in comparison to that of the petitioner in *Miller-El* in support of his contention that the jury selection procedures at his trial violated the Equal Protection Clause and this Court's holding in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). In *Miller-El*, the petitioner showed a statistical disparity along racial lines in the exclusion rate of jurors, an objective basis to question the proffered race-neutral rationales for striking certain jurors, evidence of the state's racially disparate questioning, and historic evidence of racial discrimination by that particular prosecution office. *Miller-El*, 537 U.S. at 342-347. In view of the substantial evidence demonstrating that the peremptory strikes were exercised in the case on race-based grounds, this Court concluded that a COA should have issued. *Id.* at 341, 348. While the significance of the *Miller-El* evidentiary showing was debatable, the existence of those facts was without dispute. Not so in Petitioner Hunter's case. Respondent submits that Petitioner's showing was inadequate to even raise a question as to the knowing, voluntary, and intelligent nature of his plea. Accordingly, the court of appeals properly denied Petitioner's request for a COA on this issue.

B. Effective Assistance Of Trial And Appellate Counsel

Petitioner asserts he was deprived of effective assistance of counsel in several particulars, which presumably led to his plea and conviction. Pet. at 14-25. He argues further that his appellate counsel also rendered ineffective assistance, basically for failing to pursue certain claims on collateral review. Pet. at 25-28. Neither contention presents a debatable question. Petitioner has shown neither deficient representation nor prejudice based on trial counsel's performance. Nor has he shown that appellate counsel breached any duty required by the federal Constitution.

The standard for considering claims of ineffective assistance of counsel is well settled. It requires a two-step process. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). First, Petitioner must identify acts or omissions that fall below an objective standard of reasonableness. *Id.* at 688. Second, if some deficiency is shown, Petitioner must affirmatively show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. To establish prejudice in the context of an alleged involuntary plea based on ineffective assistance of counsel, Petitioner must show a reasonable probability that, but for counsel's errors, Petitioner would not have pled guilty -- or here, no contest -- but would have insisted on going to trial. *Hill v. Lockhart*, 474 U.S. at 58-59. If Petitioner can not demonstrate prejudice, a reviewing court may reject the incompetency claims without evaluating counsel's performance. *Strickland*, 466 U.S. at 694. In this case, denial of a COA on Petitioner's IAC claim was warranted because not even a debatable question of prejudice was shown.

1. Trial Counsel

Petitioner recites a litany of trial counsel's alleged performance shortcomings, including: failure to communicate with Petitioner throughout court proceedings; failure to investigate Petitioner's mental state or argue for a diagnostic evaluation (Pet. at 14); failure to correctly advise Petitioner concerning mandatory lifetime parole (Pet. at 16-17); counsel's assorted preparation failures, but for which Petitioner would have accepted an offer of voluntary manslaughter (Pet. at 18-20); and possibly that counsel dismissed all possible defenses, though Petitioner told him he never intended to kill or harm the victim (Pet. at 20-25). But before considering these varied allegations, Respondent urges this Court to consider the representations Petitioner made at the time of his plea.

This Court has instructed that, while not insurmountable, the representations of the defendant, his attorney, and the trial court at the time of the plea constitute a "formidable barrier," that such declarations in open court carry a strong presumption of verity. *Blackledge v. Allison*, 431 U.S. 63, 73-74, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977). In *Blackledge*, this Court concluded that a subsequent presentation of conclusory allegations and contentions that are wholly incredible in the face of the record are subject to summary dismissal. *Id.* at 74. Because Petitioner's claims concerning his trial counsel's performance fall well within this description of "conclusory" and "incredible" in the face of the state record, the court of appeals properly subjected them to the approved summary dismissal by not issuing a COA.

As Respondent has previously noted, trial counsel signed a declaration in which he represented to the trial court that he had discussed the facts of Petitioner's case with him and had explained the elements of the offenses and his possible defenses. (CT 40.) Counsel represented in court that he had explained to his client what the prosecution needed to prove in order for Petitioner to be found guilty. (RT 4.) Petitioner

indicated, in turn, that he had no questions about the negotiated disposition and that he had had enough time to talk to his trial attorney. Petitioner assured the court he was certain that the negotiated disposition was how he wanted to proceed. (RT 4.) As for the terms of the plea itself, the prosecutor recited, and trial counsel concurred, that Petitioner would plead to a stipulated count of murder in the second degree. (RT 2.) Petitioner agreed that this was also his understanding of the negotiated settlement (RT 3) and expressly denied that *anyone* had made any other promise or representation to induce the plea[2/] (RT 3-4). Both the prosecutor and trial counsel also denied being aware of any other promises or representations made to Petitioner. (RT 4.) Furthermore, even though the preprinted change-of-plea form misadvised Petitioner as to one consequence of the plea -- the length of parole he faced -- the court correctly explained without any objection from Petitioner that parole would be for life. (RT 9.) Petitioner's lack of objection may be explained by the fact that his counsel correctly told him about the lifetime parole. At the state evidentiary hearing, counsel maintained that he did advise Petitioner of the lifetime parole consequence, and the state court found counsel's testimony credible. Pet. Appen. C at 10, 15-16.

Based on the foregoing, the court of appeals could dismiss out of hand those claims concerning counsel's failure to consult with Petitioner, his failure to explain the elements or possible defenses, or the alleged offer to plead to voluntary manslaughter. Not only do Petitioner's current contentions contradict his statements at the time of the plea, but they also lack evidentiary support except for Petitioner's unsubstantiated allegations. No COA was warranted.

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2. At the evidentiary hearing held in connection with state collateral proceedings, even Petitioner had to concede he had never heard directly from the district attorney any offer to plead to voluntary manslaughter. Pet. Appen. C at 14-15.

Similarly, unavailing is the complaint that counsel failed to investigate Petitioner's mental state as influenced by medication. This argument is apparently based on Petitioner's mental state at the time of the plea (Pet. at 14-16), rather than at the time of the offense, in that there was no evidence presented that Petitioner was on any medication at that earlier time. *See* Pet. at 10-11 [referring to drug being prescribed by jail doctor]. But again, Petitioner's own contemporaneous statements defeat this claim. On the written plea form, he initialed the box indicating he was then sober and had not consumed any drug or narcotic within the past 24 hours to the extent his judgment was impaired. (CT 40.) Not only did Petitioner acknowledge at the change-of-plea proceeding that he had read and understood what he initialed on the plea form (RT 3), but when asked again in court, he denied to the judge that he was then under the influence of alcohol or any drug or narcotic or prescription medication (RT 4). Under *Blackledge*, the claim concerning Petitioner's mental state could be summarily dismissed.

In any event, regardless of whether counsel should have investigated Petitioner's mental state, Petitioner can not demonstrate prejudice. There was an extensive evidentiary hearing in state court on this point, after which the judge specifically found that Petitioner was not under the influence of the prescribed medication to the extent it would interfere with his ability to make a knowing, voluntary, and intelligent plea. Pet. Appen. C at 12. Petitioner offers nothing to show the result would probably have been different had counsel acted as Petitioner suggests. Absent that reasonable probability, no prejudice is shown. More to the point, absent any evidence to support that counsel's asserted error made a difference, Petitioner can not meet his burden to raise a debatable issue to settle on appeal.

Based on all of the foregoing, the COA was correctly denied as to trial counsel's claimed ineffective assistance. Under the facts as reasonably determined by the state court and

presumed correct by the federal district court, there is no basis for reasonable jurists to question the outcome.

2. Appellate Counsel

Respondent has no quarrel with the underlying premise that Petitioner was entitled to effective assistance of appellate counsel. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). And, there is no question that the *Strickland* standard also applies to appellate counsel. *Smith v. Robbins*, 528 U.S. 259, 285, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000). However, there can be no ineffectiveness where there is no constitutional right to counsel. *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). That right now extends to trial and first appeal, as of right, but not to state or federal collateral proceedings. *Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). Thus, to the extent Petitioner's complaint against appellate counsel focuses on counsel's refusal to pursue state or federal collateral proceedings (Pet. at 27 ["Counsel never requested an expanded appointment to do a habeas petition at the state level, . . ." "counsel had been directed that a federal habeas petition should be filed"]), then he has failed to demonstrate he was denied a constitutional right.

Similarly, Petitioner has failed to identify deficient performance in or prejudice from counsel's performance in connection with the direct appeal. Petitioner's observation that, because of a heavy case load, counsel asked for extensions of time to file his brief does not identify an act outside the range of reasonable professional conduct. Nor yet has Petitioner identified any prejudice that flowed from counsel's request; the brief was filed and the state court entertained the appeal. Pet. Appen. C at 3. As for Petitioner's complaint that appellate counsel failed to raise the issues in the current writ (Pet. at 26, 27), even he recognizes that claims based on evidence outside of the record could only be reached by way of habeas petition

(Pet. at 26), and as Respondent has already argued, there is no constitutional right to counsel in collateral proceedings. *Pennsylvania v. Finley*, 481 U.S. at 555. Besides, counsel have no constitutional duty to raise on appeal every non-frivolous issue requested by a client. *Jones v. Barnes*, 463 U.S. at 751. Finally, counsel's asserted delay in sending Petitioner's entire appellate file, even if true,[3/] has obviously resulted in no identifiable harm, Petitioner's conclusory claim to the contrary (Pet. at 27, 28) notwithstanding. Petitioner has not shown that the delay hindered his ability to defend or appeal. He has been able to pursue his claims in both state and federal collateral proceedings. Pet. Appen. B, C. Further, it appears that the factual predicate for his claims remained the same as in state superior court, or before counsel allegedly returned the entire file. *See* Pet. Appen. C at 12. In any event, those claims have been rejected, not because they were untimely, but because the court found they lacked merit. Accordingly, Petitioner has not demonstrated a prima facie case showing ineffective assistance on the part of appellate counsel.

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3. The credibility of Petitioner's claim that counsel failed to send the appellate file until 1998 such that Petitioner could not proceed with this petition (Pet. at 27) is suspect. Petitioner did raise the same claims presented in this petition in the Butte County Superior Court in October of 1996. That court conducted an extensive evidentiary hearing before denying the petition in July of 1997. Pet. Appen. C at 3.

CONCLUSION

For the reasons stated, the court of appeals correctly concluded that Petitioner did not make a substantial showing he had been denied any constitutional right where he failed to present sufficient evidence to raise a debatable question in the minds of reasonable jurists that the district court's resolution of the issues was wrong. Therefore, Petitioner's request for a COA was properly denied, and this Court should deny the petition for certiorari.

Dated: April 23, 2004

Respectfully submitted,

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Attorney General of the State of California

ROBERT R. ANDERSON
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MARY JO GRAVES
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Counsel for Respondent

No. 03-1226

IN THE SUPREME COURT OF THE UNITED STATES

BOBBY GENE HUNTER, *Petitioner,*

v.

GLENN A. MUELLER, Warden et al., *Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS F OR THE NINTH CIRCUIT

**BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI**

CERTIFICATE OF SERVICE

I, Wanda Hill Rouzan, a member of the Bar of this Court, hereby certify that on this 23rd day of April, 2004, a copy of Brief In Opposition To Petition For Writ of Certiorari, in the above-captioned case was mailed, via first class postage prepaid, in the United States Postal Service to:

Richard Dangler **(Counsel for Petitioner - Bobby Hunter, 3 copies)**
Attorney at Law
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All persons required to be served have been so served.

Dated: April 23, 2004

WANDA HILL ROUZAN
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Supreme Court, U.S.
FILED
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(3)

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SUPREME COURT OF THE UNITED STATES

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vs.

GLENN A. MUELLER, et al,

Respondent.

On Petition for Writ of Certiorari
To The Ninth Circuit Court of Appeals

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the United States Court of Appeals for the Ninth Circuit err in denying Petitioner's request for a Certificate of Appealability based upon the finding that Petitioner has made no substantial showing of the denial of a constitutional right sufficient to be entitled to federal appellate review of the merits of his claims despite the substantial nature of the issues presented by Petitioner for appeal?

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STATEMENT OF THE CASE

Petitioner herein brought this Petition for Writ of Certiorari on the issue of whether the United States Court of Appeals erred in denying Petitioner's Request for a Certificate of Appealability as Petitioner asserts his Petition for Writ of Habeas Corpus in the Eastern District Court satisfied the substantial showing required of the denial of a constitutional right sufficient to be entitled to federal appellate review of the merits of his claims.

On or about April 28, 2004, Respondent, by and through his counsel of record, filed a brief in opposition to the above-referenced Petition for Writ of Certiorari. Petitioner herein files the following reply to the Attorney General's brief in opposition to the petition.

STATEMENT OF THE FACTS

Petitioner submits that his Due Process rights were violated because his plea was not made knowingly, voluntarily or intelligently.

Petitioner submits that his Sixth Amendment right to counsel was violated because he was denied effective assistance of counsel.

Petitioner submits that his right to counsel was violated when he was never fully informed of the consequences of his plea.

Petitioner submits that right to effective assistance of appellate counsel was violated.

ARGUMENT

THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT ERRED IN DECLINING PETITIONER'S REQUEST FOR A CERTIFICATE OF APPEALABILITY BECAUSE PETITIONER HAS MADE A DEBATABLE SHOWING THAT HIS RIGHTS TO DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED.

Respondent correctly points out that in order to determine the appealability of a petition for writ of habeas corpus, the petitioner must demonstrate that a reasonable judge would find the district court's decision debatable. *Miller-El v. Cockrell*, 537 U.S. 322, 338, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003). In the instant case, however, Petitioner has made such a demonstration, and as such has made a substantial showing, both that his No Contest plea was involuntary, and that he received ineffective assistance of counsel.

A. Petitioner's Guilty Plea was Invalid.

Respondent has asserted that a No Contest plea must be knowing, voluntary and intelligent; must be an intelligent choice among available alternatives; that a defendant must be informed of the charges against him and the maximum

exposure of any potential sentence; that the plea must be a knowing and intelligent waiver of constitutional rights; and the defendant must be competent to plead (Respondent at 5). All of Respondent's assertions are correct; however, none of the above requirements were present in Petitioner's No Contest plea, in that Petitioner was not determined to be competent to plead, and he was not properly advised of the nature and consequences of his plea. Therefore, Petitioner's No Contest plea cannot constitutionally be allowed to stand.

1. Petitioner Was Not Determined to be Competent to Plead No Contest.

It is not meaningfully disputed that during Petitioner's sentencing, his probation report contained evidence that he was under the influence of drugs and alcohol (See Respondent at 7). This fact alone creates a debatable issue that provides a proper basis for appeal under *Miller-El.* 537 U.S. at 338.

Respondent now argues that "nothing in the [probation] report ties this description [of intoxication] to the relevant time of the plea, and that Petitioner stated he was sober during the plea (Respondent at 7). However, despite Respondent's assertions, the very existence of this fact in the probation report is something that calls Petitioner's competency into question. Indeed, if there exists a serious possibility that Petitioner is incompetent, the judge is obligated to hold a competency hearing before accepting any plea. *Pate v. Robinson*, 383 U.S. 375, 385, 86 S. Ct. 836 (1966).

Further, Respondent's argument that Petitioner bears the burden of proving incompetence is irrelevant in the instant case. A competency hearing was never held, despite being ample evidence requiring the judge to hold such a hearing. Thus, there was never an opportunity to determine Petitioner's mental state, be it competent or otherwise, and the burden of proof does not bear on the issue.

The heart of this matter is that the judge was presented with evidence that Petitioner was under the influence of drugs and alcohol. Such evidence necessarily raises a doubt as to Petitioner's competency, which required the judge to hold a competency hearing. *Pate*, 383 U.S. at 385. This was not done, and Petitioner's right to due process was violated thereby. As such, Petitioner has raised a debatable issue regarding the district court's decision, and the Court of Appeals therefore erred in failing to grant Petitioner a Certificate of Appealability.

2. Petitioner Was Not Properly Advised of the Nature and Consequences of his No Contest Plea.

In order for a plea to be valid, a defendant must be informed of the nature of the charges against him. *Henderson v. Morgan*, 426 U.S. 637, 645, 96 S. Ct. 366, 369 (1976). The defendant must also know the consequences of his plea. *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969).

In the instant case, Respondent has asserted that no debatable issue arises from Petitioner's lack of understanding of his No Contest plea. Specifically, Respondent asserts that

Petitioner's trial attorney indicated in court that he had explained the elements of the offenses and the nature of the crime, and therefore there is no debatable issue for appeal (Respondent at 9-10). Respondent's argument, however, glosses over the fact that Petitioner, despite what his counsel may have told him regarding the plea, did not fully understand that pleading No Contest meant that he was admitting to malice. Further, Petitioner did not understand the nature of intent to kill and how it related to a plea of No Contest to a Second Degree Murder charge. Thus, regardless of what Petitioner signed, it is clear that he was confused as to what his plea really meant. As such, it is certainly debatable, indeed likely, that Petitioner was not properly advised of the nature and consequences of the plea. Therefore, the lower courts erred in refusing to issue a Certificate of Appealability.

B. Petitioner Received Ineffective Assistance of Trial Counsel.

Respondent argues extensively that Petitioner's evidence was insufficient to establish ineffective assistance of trial counsel, because his arguments were "conclusory and incredible" (Respondent at 12). Respondent oversimplifies the issue. In order to establish ineffective assistance of counsel, it must first be established that the attorney's performance fell below an objective standard of reasonableness. *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052 (1984). It must then be established that

but for this substandard performance, the result of the proceeding would have been different. *Id.* at 694.

Here, Respondent asserts that Petitioner's arguments regarding counsel's errors should be dismissed out of hand because they lack evidentiary support (Respondent at 12-13). This assertion avoids the issue. The fact that Petitioner's arguments create a dispute in the evidence is no reason to ignore them, simply because those very arguments create a debatable issue that is required to obtain a certificate of appealability. *Miller-El*, 537 U.S. at 342.

Simply put, despite what trial counsel has stated, Petitioner has shown a number of errors made by that attorney that clearly amount to ineffective assistance of counsel. Trial counsel failed to communicate with Petitioner throughout his court proceedings. Counsel did not investigate Petitioner's mental state, and did not argue for a diagnostic evaluation after indicating that one would be done. The consequences of Petitioner's plea were not mentioned until the end of sentencing. Counsel dismissed all possible defenses after stating that he was developing grounds to argue involuntary manslaughter. Petitioner was prejudiced by each and every one of the above errors.

Furthermore, it is well settled in California that if a criminal defendant is prejudiced by his attorney's errors, he must be given an opportunity to withdraw his plea. *People v. Johnson*, 35 Cal. App. 4th 1351 (1995). Petitioner was not given this opportunity, thereby prejudicing him further.

The above errors committed by trial counsel demonstrate a debatable issue, and therefore warranted a certificate of appealability. It was error for the lower courts not to issue one.

C. Petitioner was Deprived of Effective Assistance of Appellate Counsel.

Respondent argues that Petitioner did not show any deficient performance that prejudiced Petitioner. This assertion is inaccurate (Respondent at 15-16). Petitioner has shown that appellate counsel delayed substantially in communicating with his successor counsel hired by Petitioner, and that this resulted in a failure to raise many issues on appeal that were highly meritorious. Under an objective standard of reasonableness, this is deficient performance by an attorney. *Strickland*, 466 U.S. at 488. Given the clear merit of the issues that were not raised due to this deficiency, Petitioner was prejudiced significantly, as there is a strong likelihood that Petitioner's conviction would have been reversed if the issues had been raised. *Id.* at 694. Such a likelihood raises a significant debatable issue, which warrants a certificate of appealability under *Miller-El*. 537 U.S. at 342. Thus, denial of the COA was error.

CONCLUSION

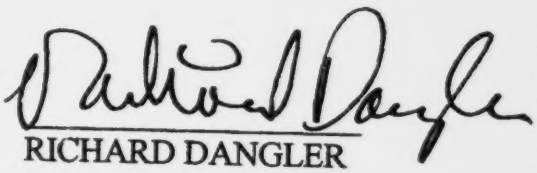
Petitioner respectfully requests this Court find that Petitioner has made a substantial showing of the denial of his constitutional rights, in that Petitioner has raised numerous debatable issues that warrant a certificate of appealability. As such, Petitioner submits that denial of the certificate of appealability was error on the part of the lower courts.

Petitioner requests this Court reverse the Judgment of the Court of Appeal to deny the request for a certificate of appealability and provide Petitioner the opportunity for federal court review on the merits of his claims.

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeal for the Ninth Circuit in denying the petitioner's request for a Certificate of Appealability.

Respectfully submitted.

DATED:
5-3-04

By: 
RICHARD DANGLER
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Furthermore, it is well settled in California that if a criminal defendant is prejudiced by his attorney's errors, he must be given an opportunity to withdraw his plea. *People v. Johnson*, 35 Cal. App. 4th 1351 (1995). Petitioner was not given this opportunity, thereby prejudicing him further.

The above errors committed by trial counsel demonstrate a debatable issue, and therefore warranted a certificate of appealability. It was error for the lower courts not to issue one.

C. Petitioner was Deprived of Effective Assistance of Appellate Counsel.

Respondent argues that Petitioner did not show any deficient performance that prejudiced Petitioner. This assertion is inaccurate (Respondent at 15-16). Petitioner has shown that appellate counsel delayed substantially in communicating with his successor counsel hired by Petitioner, and that this resulted in a failure to raise many issues on appeal that were highly meritorious. Under an objective standard of reasonableness, this is deficient performance by an attorney. *Strickland*, 466 U.S. at 488. Given the clear merit of the issues that were not raised due to this deficiency, Petitioner was prejudiced significantly, as there is a strong likelihood that Petitioner's conviction would have been reversed if the issues had been raised. *Id.* at 694. Such a likelihood raises a significant debatable issue, which warrants a certificate of appealability under *Miller-El.* 537 U.S. at 342. Thus, denial of the COA was error.

CONCLUSION

Petitioner respectfully requests this Court find that Petitioner has made a substantial showing of the denial of his constitutional rights, in that Petitioner has raised numerous debatable issues that warrant a certificate of appealability. As such, Petitioner submits that denial of the certificate of appealability was error on the part of the lower courts.

Petitioner requests this Court reverse the Judgment of the Court of Appeal to deny the request for a certificate of appealability and provide Petitioner the opportunity for federal court review on the merits of his claims.

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment of the United States Court of Appeal for the Ninth Circuit in denying the petitioner's request for a Certificate of Appealability.

Respectfully submitted.

DATED:
5-3-04

By:

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